APPENDIX.

Section 4 of the Act of Congress of May 10, 1928, 45 Stat. 495, reads as follows:

"SEC. 4. That on and after April 26, 1931, the allottee inherited, and devised restricted lands of each Indian of the Five Civilized Tribes in excess of one hundred and sixty acres shall be subject to taxation by the State of Oklahoma under and in accordance with the laws of that state, and in all respects as unrestricted and other lands: *Provided*, That the Indian owner of restricted land, if an adult and not legally incompetent, shall select from his restricted land a tract or tracts, not exceeding in the aggregate one hundred and sixty acres, to remain exempt from taxation and shall file with the Superintendent for the Five Civilized Tribes a certificate designating and describing the tract or tracts so selected: *And provided further*, That in cases where such Indian fails, within two years from date hereof, to file such certificate, and in cases where the Indian owner is a minor or otherwise legally incompetent, the selection shall be made and certificate prepared by the Superintendent for the Five Civilized Tribes; and such certificate, whether by the Indian or by the Superintendent for the Five Civilized Tribes, shall be subject to approval by the Secretary of the Interior and, when approved by the Secretary of the Interior, shall be recorded in the office of the Superintendent for the Five Civilized Tribes and in the county records of the county in which the land is situated; and said lands, designated and described in the approved certificates so recorded, shall remain exempt from taxation while the title remains in the Indian designated in such approved and recorded certificate, or in any full-blood Indian heir of devisee of the land: *Provided*, That the tax exemption shall not extend beyond the period of restrictions provided for in this Act: *And provided further*, That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres."

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 770

FANNIE E. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR REHEARING

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ARGUMENT

Upon the basis of documents found among the records in the office of the Superintendent for the Five Civilized Tribes, which petitioner alleges "were not available to her, or her counsel, at the time of the preparation and filing of her petition in this cause," because "neither petitioner, nor her counsel, were able to inspect the public records in the office of the Superintendent * * *" (Pet. 5),[1] petitioner contends that

[1] Nothing prevented petitioner or her counsel, at any time during this litigation, from requesting permission to examine the files of the Five Tribes' Agency for the purpose of ascertaining the existence of the documents relied upon. Under

a rehearing should be granted because of a "settled administrative construction" which "was overlooked by the court below" (Pet. 1, 5).

The documents relied upon show that between 1931 and 1935 the Superintendent of the Five Civilized Tribes wrote a number of letters advising that the restrictions in the Carney-Lacher form of deed expired April 26, 1931 (Pet. 2, 7–9), and that immediately prior to and following April 26, 1931, the Superintendent and the Commissioner of Indian Affairs in a number of instances requested the Secretary of the Interior to approve transfers of land purchased on the Carney-Lacher form of deed, in order that the restrictions, which under the terms of the deeds would expire on April 26, 1931, might be continued, and the First Assistant Secretary approved the transfers (Pet. 2–5, 10–13).

It does not appear that the Department of the Interior ever formally took the position that the

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applicable legislation and regulations of the Department of the Interior providing for the inspection of departmental records, such permission would be withheld only if the material sought was deemed "confidential" or "prejudicial to the interests of the Government." Act of August 24, 1912, 37 Stat. 497, 43 Code of Federal Regulations, Pt. 2, secs. 2.1–2.6; Departmental Order No. 1610, dated September 16, 1941, a copy of which is attached; Departmental Order No. 1918, dated February 8, 1944, a copy of which appears at pp. 13–15 of the petition for rehearing. Neither petitioner nor her counsel has any reason to believe that they would have been denied opportunity to examine pertinent records of the Five Tribes Agency had they sought permission to do so earlier.

Act of May 10, 1928, 45 Stat. 495 did not extend restrictions on purchased lands. The First Assistant Secretary's approval of the transfers does not amount to an official ruling that the 1928 Act did not extend restrictions, because his approval may well have been based simply on the desirability of the transfers from the standpoint of the Indian grantors and grantees. It is apparent from the correspondence of the Superintendent of the Five Civilized Tribes, however, that during the period 1931–1935 the Superintendent was of the opinion that the 1928 Act did not extend restrictions on purchased land, but there is no evidence that the Department of the Interior knew of the Superintendent's letters or approved of the views expressed therein. In the case of *United States* v. *Watashe*, 21 F. Supp. 903 (N. D. Okla.), affirmed on other grounds, 102 F. 2d 428 (C. C. A. 10), which was begun in 1937, the Government took the position that the 1928 Act was intended to extend restrictions on purchased land. The Department of the Interior has since regarded the question as one to be finally settled by the courts. It would thus appear that there has never been any "settled administrative construction" of the statute.

Moreover, the matter is not, as petitioner believes, one which "was overlooked by the court below." The Government, urging that the problem was one of great administrative importance, advised the trial court that 850 Carney-Lacher

deeds had been executed. From this the trial court concluded that the decision ought to be in petitioner's favor, since an adverse decision would disturb "850 titles like that of plaintiff." At page 12 of its brief in the court below petitioner emphasized the view taken by the trial court, asserting:

> So, as the trial court properly concludes, these large investments should not be destroyed, unless there is plain compulsion therefor found in the express terms of the act; and there it does not exist. No policy of the department is shown indicating a construction existing since the passage of the Act of 1928, such as appellant now seeks to have established. Indeed, from the circumstances above stated, the interpretation of the Department, as exemplified by its Muskogee, Oklahoma, office of the Superintendent of the Five Civilized Tribes, must be assumed to have been to the contrary. Otherwise, in decency and justice, some official warning as to such titles would have certainly been brought to the notice of the examining attorneys and the general public.

In a supplemental memorandum, which is referred to but not reproduced in the record (p. 39), a copy of which is appended, *infra,* pp. 11–14, the Government advised the court below that of ~~the~~ 295 Carney-Lacher titles ~~118~~ 118 which had been examined, had been sold by the grantees without

approval. In keeping with petitioner's argument below, the petition for a writ of certiorari stated (p. 8), "The decision below disturbs numerous titles in the eastern part of the State of Oklahoma." Thus, while the documents petitioner relies upon were not before the lower courts, it appears that the court below had before it information which reflected the departmental attitude, particularly the attitude of the Superintendent for the Five Civilized Tribes, toward Carney-Lacher titles.

The decision below was based upon considerations, which, independently of the viewpoint of the Superintendent for the Five Civilized Tribes, required a holding that Congress intended by the 1928 Act to extend restrictions on purchased lands. Those considerations were the substantial equivalence of restrictions on allotted lands and restrictions on purchased lands; the absence of any substantial basis for distinguishing between the two types of land; the course of subsequent legislation which showed that Congress could not have intended to distinguish between the two; and the anomalous and inexplicable results which would follow from a decision distinguishing between the two. See pages 4–12 of the Government's brief opposing certiorari. Thus, the decision below rests upon a sound basis and is clearly correct.

CONCLUSION

It is therefore respectfully submitted that the petition for rehearing should be denied.

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NORMAN MACDONALD,
Attorney.

MAY 1944.